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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-223

ERASMUS IANNACCONE and FREDERICK KAGAN,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

WILLIAM SONENSHINE
Attorney for Petitioner
Office & Post Office Address
186 Joralemon Street
Brooklyn, New York 11201
ULster 5-1111

EVSEROFF, NEWMAN & SONENSHINE
Of Counsel

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on July 7, 1971.

A. Opinions Below

An opinion was rendered by the New York State Court of Appeals, which opinion is annexed to the petition as Appendix A.

On Appeal from the original judgment dismissing the indictment to the Appellate Division of the Supreme Court in and for the Second Judicial Department in the State of New York the judgment appealed from was affirmed Febru-

ary 8, 1971 without opinion. A dissenting opinion was written by Mr. Justice Benjamin. Said dissenting opinion is annexed to the petition as Appendix B.

There were no other opinions written in connection with the case.

B. The Grounds Upon Which the Jurisdiction of This Court Is Invoked

Jurisdiction of this Court is invoked under Title 28, U.S. Code §1257(3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Court of Appeals of the State of New York made on July 7, 1971 as aforesaid.

C. The Question Presented for Review

Can evidence obtained by wiretap in November and December of 1969 be introduced as evidence by the State in a trial yet to be held in the light of *Fuller* v. *Alaska*, 393 U.S. 80 (Oct. 1968) and *Lee* v. *Florida*, 392 U.S. 378 (June 1968).

D. Constitutional Provision Involved

The constitutional provision involved are those portions of the Fourth Amendment to the United States Constitution dealing with unreasonable searches and seizures. See Appendix D.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

The two named defendants were indicted together with two others. All four defendants were charged in a one count indictment, charging arson in the third degree. On or about May 6, 1969 the above named petitioners moved to suppress the wiretap evidence obtained against them. The County Court of Nassau County granted the motion to suppress under the authority of *Lee* v. *Florida,* 392 U.S. 378 and *Fuller* v. *Alaska,* 393 U.S. 80. Thereafter, the respondents moved to inspect the Grand Jury minutes, contending that the balance of competent legal evidence was not sufficient to sustain the indictment. This motion to inspect the minutes and dismiss the indictment was granted. The Appellate Division, Second Department of the State Supreme Court, affirmed the foregoing decisions with one dissent. Thereafter, the respondents sought and obtained leave to appeal to the New York State Court of Appeals. On July 7, 1971 the Court of Appeals reversed and reinstated the indictment on the strength of their companion decision in *People* v. *Feinlowitz,* a copy of which is annexed as Appendix A. Two Judges of the Court of Appeals dissented in this case and in *Feinlowitz.*

F. The Stages of the Proceedings in Which the Issues Involved Were Raised and the Manner in Which They Were Raised

The Federal constitutional issues presented herein were raised at the first available opportunity as follows:

The motion to suppress evidence was made prior to trial as was the motion to inspect the Grand Jury minutes and

dismiss the indictment. The same issues therein raised were argued upon each of the appeals in the State Courts.

G. Argument Amplifying the Reasons Relied on for the Writ

In *Lee* v. *Florida*, 392 U.S. 378 the Supreme Court for the first time applied the provision of §605 of Title 47 U.S.C. (Federal Communications Act) to the States. The Court did this upon two simple predicates, (a) no State should wilfully violate Federal law; (b) the penal provisions intended to obtain compliance did not work. These principles were set forth on pages 385-386:

> "But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity.' Elkins v. United States, 364 U.S. 206, 222. Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State [are] bound. . . .'
>
> Finally, our decision today is counseled by experience. The hope was expressed in Schwartz v. Texas that '[e]nforcement of the statutory prohibition in §605 can be achieved under the penal provisions' of the Communications Act. 344 U.S., at 201. That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of §605 since the statute was enacted. We conclude, as we concluded in Elkins and in Mapp, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law 'in the only effectively available way—by removing the incentive to disregard it.' Elkins v. United States, 364 U.S. at 217."

The Supreme Court decided in *Fuller* v. *Alaska*, 393 U.S. 80 that the decision in *Lee* v. *Florida* should be applied prospectively in the following language at page 80:

> "We hold, however, *that the exclusionary rule of Lee is to be given prospective application*, and accordingly, we affirm." (*Underlining* supplied for emphasis.)

The Appellate Division Second Department in affirming, in effect held that the wiretap evidence obtained in 1966 could not be admitted at the future trial. This was exactly what the County Court Judge held in the trial Court. The trial herein has not been held.

The decision in *Fuller* v. *Alaska*, 393 U.S. 80 (Oct. 1968) was made after the new authority for wiretapping was created in the so-called Safe Street Act 18 U.S.C. §2513 et seq. (June 19, 1968). Thus, the provision of that statute cannot be said to have been ignored by this Court in its decision in *Fuller* v. *Alaska* (*supra*). The test of applicability decreed in *Lee* v. *Florida supra* was the trial, not the gathering of the evidence or its presentation to a Grand Jury.

Any argument advanced to indicate that §605 of Title 47 is no longer viable is without merit. Examination of 18 U.S.C. §2515 clearly indicates that the prohibition of Title 47 §605 is continued in full force and effect. Indeed, the prohibition is included to bar presentation of evidence so obtained before a Grand Jury.

Reliance upon the decisions in *Desist* v. *United States*, 394 U.S. 244 or *Kaiser* v. *New York*, 394 U.S. 280 is misplaced. *Desist* v. *United States supra* merely held that the principle announced in *Katz* v. *United States*, 389 U.S. 347

could only be applied prospectively not to a trial which had already been held. In *Kaiser* v. *New York supra,* the trial had also been held and, therefore, the decision in *Berger* v. *New York,* 388 U.S. 41 was not applicable. Neither of these two decisions in any way diminished or modified the already existing decision in *Fuller* v. *Alaska,* 393 U.S. 80.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

WILLIAM SONENSHINE
Attorney for Petitioners
186 Joralemon Street
Brooklyn, New York 11201

EVSEROFF, NEWMAN & SONENSHINE
Of Counsel

APPENDICES

APPENDIX A

Opinion of the New York State Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

APP. T. 2. No. 32. 71

THE PEOPLE &c.,

Respondent,

vs.

BENJAMIN FEINLOWITZ,

Appellant.

JASEN, *J.*:

The crucial issue in this case concerns the admissibility of certain recordings of defendant's voice obtained as a result of a wiretap made pursuant to court order. We conclude that the admission of the evidence was violative of neither the constitutional nor statutory rights of defendant and that, consequently, his conviction should be affirmed.

In May of 1966, the Mount Vernon Police Department received a tip from an informant, who had previously proven reliable, that a public telephone in George's Pharmacy was being used to transmit horse racing and sporting bets. A detective assigned to observe this location noticed defendant, a known and convicted gambler, repeatedly

leave his office (where there was a telephone) and use this public phone booth. Moreover, on one occasion, he overheard defendant discussing baseball lines and quoting odds on that day's games. On the basis of this information, the police secured an order from the Westchester County Court authorizing them to intercept and record conversations over that telephone line.

Pursuant to that order, a tap was installed on May 18, 1966, and was frequently monitored by the police. On June 15, the tap was being monitored by Detective Burke, who overheard several sports bets being transmitted. He immediately contacted two other officers, who then entered the pharmacy and went to the telephone booth. These officers possessed a search warrant authorizing them to search defendant's person. They discovered defendant in the phone booth with the receiver in his hand and with an envelope and two slips of paper laying nearby. He was asked to step out of the phone booth, where a search of his person revealed $1,495.42 in cash and several other slips of paper. An additional $5,000 in cash was found in the envelope and all of the slips contained sports bets and gambling odds.

The tape of defendant's telephone conversation, which was introduced over his objection at trial, revealed the taking of several bets. Detective John Roach identified one of the records introduced in evidence as a record of the three team parlay bet which the taped conversation concerned. Richard Burke, the detective who made the recording, identified the voice of the defendant on the tape as the receiver of this bet. Also, at the trial, Stephen Fein,

the defendant's son, testified in his father's defense. He contended that the cash possessed by defendant was the proceeds of a loan which he (Fein) had obtained to purchase certain machinery for his business. However, no business records were produced to verify this claim.

Upon this record, defendant was convicted by the City Court of Mount Vernon of the crimes of bookmaking and possession of bookmaking records (former Penal Law, §§ 986, 986-b). For these convictions, defendant was sentenced to concurrent terms of thirty days imprisonment.

The defendant argues on this appeal that the introduction of evidence obtained by wiretapping was constitutionally impermissible and should have been excluded at the trial. In addition, the defendant urges that the order authorizing the telephone interception was void because it violated section 605 of the Federal Communications Act.

At the time the authorized telephone interception occurred, there were no significant Federal constitutional restraints relative to securing and using wiretap evidence. The basic pronouncement by the Supreme Court in this area remained *Olmstead* v. *United States* (277 U. S. 438), which explicitly held that a wiretap, conducted a physical intrusion into the defendant's premises, was not an unlawful search and seizure within the meaning of the Fourth Amendment. It is thus clear that at the time the wiretap occurred, the intrusion did not violate the *Olmstead* rule. Moreover, at the time, such conduct in New York was regulated by section 813-a of the Code of Criminal Procedure, which specified procedures for obtaining a court order authorizing a wiretap. There is no contention made

here that the dictates of that section were not scrupulously followed.

However, the period between the seizure of the evidence and the judgment of conviction[1] was a time of rapidly changing constitutional interpretation in this area. *Katz* v. *United States* (389 U. S. 347) specifically invalidated the long-standing *Olmstead* rule and declared that nontrespassatory seizures were also constitutionally protected. Additionally, in *Berger* v. *New York* (388 U. S. 41), the Supreme Court declared that section 813-a of the Code of Criminal Procedure was at least partially unconstitutional for its overbreadth.[2]

Consequently, the specific problem arising out of this rapidly changing complex of decisional law is to determine precisely what constitutional rule is applicable to this prosecution. The Supreme Court has addressed itself to this perplexing question in two recent cases and, seemingly has provided a rather clear answer. In *Desist* v. *United States* (394 U. S. 244), the Court held that *Katz* is to be applied prospectively only. This was further explained in *Kaiser* v. *New York* (394 U. S. 280) to mean that if "the wiretapping in this case occurred before *Katz* was decided and was accomplished without any intrusion into a constitutionally protected area of the petitioner, its fruits were not inadmissible under the exclusionary rule of the Fourth and

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[1] The conversation was recorded June 15, 1966, and defendant was convicted July 31, 1969.

[2] The New York Legislature responded to this decision by enacting Title III of the Code of Criminal Procedure (§§ 814-825), which contains provisions designed to meet the constitutional objections enunciated in the *Berger* case.

Fourteenth Amendments." (394 U. S. 280, 282.) *Kaiser* also instructs us that the *Berger* decision is not applicable retroactively. The Court there affirmed a decision of this court (see 21 N Y 2d 86) wherein wiretap evidence had been seized pursuant to section 813-a—later declared unconstitutional in *Berger*. The Supreme Court, thus, affirmed our holding that the *Berger* decision should be given only prospective application (21 N Y 2d at 98).

A careful examination of the *Desist* and *Kaiser* decisions reveals that the determinative factor in both cases centers on the date upon which the seizure of the evidence occurred. (See, 394 U. S. at 282.) Hence, if the evidence was seized in a manner constitutionally permissible at the time of seizure, it will subsequently be allowed into evidence at the defendant's trial even though changing constitutional interpretations have since made a similar seizure impermissible.[3] Since it cannot be seriously contended here that the seizure was constitutionally defective by 1966 standards, we conclude that the recordings were properly allowed into evidence at defendant's later trial.

While it is true that the wiretap order was issued in 1966 under a subsequently declared unconstitutional law, the basis upon which it was authorized closely approximates the standards set forth in *Berger*. A close examination of the *Berger* decision reveals that the major constitutional objections to section 813-a were twofold—the fact that the

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[3] The rationale behind such a dichotomy is quite apparent. The deterrent purpose of an exclusionary rule such as this would not be furthered by excluding evidence seized in a manner that was constitutionally acceptable at that time. Moreover, an exclusionary rule has no real bearing on guilt or the fairness of the trial. (*Linkletter* v. *Walker*, 381 U. S. 618, 638-639.)

statute only required a reasonable ground to believe that a crime had been committed (rather than probable cause) and a lack of particularity in description of what was to be seized and the evidence sought. Here, there obviously was probable cause for the seizure by reason of the extensive observation of defendant's suspicious activities. Defendant, a known and convicted gambler, was seen to frequently use a public telephone booth, despite having access to a private telephone at his office. Upon one occasion, a police officer personally heard defendant discussing sports lines on baseball games and quoting odds on the day's games to someone with whom he was in contact on that telephone. Thus, the primary constitutional defect denominated in the *Berger* case was certainly not present here. Moreover, the affidavit in support of the wiretap order specifically described the defendant and his suspected gambling activities, including the specific location to be observed. Under such circumstances, any deviation from the standards enunciated in *Berger* and *Katz* must be considered as harmless in light of the overwhelming evidence against defendant.

We turn then to the second question posed—that the introduction of the wiretap evidence was prohibited by section 605 of the Communications Act of 1934 (47 U. S. C. 605). Section 605, as it read in 1966, stated, in pertinent part, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." This section has been interpreted to prohibit all wire tapping of telephonic communications (see, *Pugach* v. *Sullivan*, 180 F. Supp. 66, affd. 365 U. S. 458; *Diamond* v. *United*

States, 108 F. 2d 859), except where one party consented to the interception (*United States* v. *McGuire,* 381 F. 2d 306, 314, cert. den. 389 U. S. 1053). This ban upon the interception and divulgence of communications applied to both intrastate and interstate activities. (*Weiss* v. *United States,* 308 U. S. 321; *People* v. *Broady,* 5 N Y 2d 500, cert. den. 365 U. S. 8.)

While the Supreme Court has long held that evidence seized in violation of section 605 was inadmissible in a Federal court (*Nardone* v. *United States,* 302 U. S. 379), it specifically ruled that section 605 "does not exclude such evidence in state court proceedings" (*Schwartz* v. *Texas,* 344 U. S. 199). Thus, at the time the wiretap order was issued in this case, such action was in violation of section 605, but the evidence was admissible in a state criminal proceeding.

After the federal exclusionary rule had been made applicable to the states by *Mapp* v. *Ohio* (367 U. S. 643), the Supreme Court took occasion to reconsider *Schwartz,* in *Lee* v. *Florida* (392 U. S. 378, decided June 17, 1968), holding that evidence seized in violation of section 605 was also inadmissible in state criminal proceedings. In *Fuller* v. *Alaska* (393 U. S. 80), the Court held that *Lee* should be given only prospective effect and "applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee.*" (*Id.,* at 81.)

Consequently, defendant argues that *Lee* and *Fuller* mandate the exclusion of the wiretap evidence here. We can-

not agree. Two days after *Lee* was decided, the Omnibus Crime Control and Safe Streets Act of 1968[4], which included substantial amendments to section 605, became law. In Title III, Congress for the first time enacted a comprehensive scheme authorizing the interception of telephonic communications and specifically authorized the introduction of overheard evidence in court under denominated comprehensive standards. (18 U. S. C. 2511-2519.)

Therefore, the question posed is whether section 605, as amended, bars the introduction of evidence obtained as a result of a court-ordered wiretap authorized prior to the amendment.

We believe that Congress did, in fact, intend to sanction prior wiretapping as indicated by its findings enacted as section 801 of the Omnibus Crime Control and Safe Streets Act of 1968, wherein Congress found:

> "(a) * * *
>
> "There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of the communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce * * *
>
> "(b) In order to protect effectively the privacy of wire and oral communications, to protect the integ-

[4] Public Law, 90-351.

> rity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.
>
> "(c) Organized criminals make extensive use of wires and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice."

These legislative findings, made prior to the *Lee* decision, at a time when *Schwartz* was still viable, seem to clearly indicate the acceptance by the federal legislature of the then generally accepted practice of introducing in state courts the fruits of court authorized wiretaps. There can be no doubt that the purpose of the exclusionary rule enunciated in *Lee* was to enforce compliance with the Federal Communications Act. This rule was built upon an assumption —enunciated in the *Nardone* case—that Congress intended to bar wiretapping by enacting section 605 in 1934. The error in the assumption, however, became apparent subsequent to the Supreme Court's decision in *Lee* when the Congressional findings enacted as section 801 of the Omnibus Crime Control and Safe Streets Act of 1968 made it abundantly clear that the Court had been misreading the Congressional silence in the years since the decision in *Schwartz*. (Cf., Black, J., dissenting in *Lee* v. *Florida*, *supra*, at 387-

388.) Thus, the enactment of the Safe Streets Act should remove any doubt as to the intent of Congress in this area of the law, and it is axiomatic that on questions of legislative intent, the Legislature is supreme.

To exclude the wiretap evidence in this case on the basis of *Lee* would, in effect, be enforcing a statutory policy, since substantially modified and no longer applicable. We believe the well-established rule, that we give effect to the law as it exists at the time of our decision, should be adhered to. (*People* v. *Loria*, 10 N Y 2d 368, 370; *Knapp* v. *Fasbender*, 1 N Y 2d 212, 243.)

The question remains as to whether strict compliance with the provisions of the Safe Streets Act or the newly-amended Code of Criminal Procedure is necessary in this case. We think not and hold that in seizures made before the effective date of the Safe Streets Act, substantial compliance with its provisions is all that is required to bring the evidence within the newly-enacted exception in section 605. The crucial fact is that Congress has clearly indicated a policy to allow courtroom use of judicially supervised and controlled wiretaps. Thus, in light of this clearly enunciated policy, it would seem to defeat congressional intent to require a technical compliance with Chapter 119 since this would result in the virtual inadmissibility of almost all wiretap evidence obtained before the passage of the Act. Consequently, if on such wiretaps there is a clear showing of substantial compliance with the new standards, the evidence will be deemed admissible.

There can be little doubt that such substantial compliance was present here. The wiretap was obtained under

judicial supervision, in full compliance with section 813-a of the Code of Criminal Procedure, with probable cause for the seizure clearly indicated. Thus, there seems to be no valid reason to exclude such evidence especially since the police acted in full compliance with both constitutional law and the statutory law of our state as it existed at that time.

We have examined the other contentions raised by defendant and find them to be without merit.

Accordingly, the judgment of conviction should be affirmed.

BURKE, J. (Dissenting)

The majority holds that wiretap evidence, obtained years ago in violation of existing law and inadmissible under the standards established by the Supreme Court, is now admissible at a trial in 1971. We believe that such a holding is clearly in conflict with the decisions of the United States Supreme Court, and, therefore, dissent and vote to reverse.

In *Fuller v. Alaska* (393 U.S. 80 [Oct. 1968]), the Supreme Court held "that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee* [v. *Florida*, 392 U.S. 378]" (p. 81—June 17, 1968). The trial of defendant Feinlowitz commenced on May 22, 1969, almost a year after *Lee* was decided. Inasmuch as *Fuller* was decided after the enactment (June 19, 1968) of the Safe Street Act (18 U.S.C. § 2513 et seq.), it is not for this Court to say that the Supreme Court's decision is no longer viable. Whether or not, in view of the Safe Street

Act, the *Fuller* holding was advisable is a question properly addressed to the Supreme Court of the United States. To put it another way, the question is simply not open to us. This case does not require a determination of the effect of *subsequent* legislation upon a Supreme Court decision. The *Fuller* case was decided after the Safe Street Act had been enacted into law. We may not assume that the Supreme Court did not consider the applicability of its provisions.

Nor is an affirmance indicated by the Supreme Court's later decision in *Desist* v. *United States* (394 U.S. 244). In that case the trial took place before *Lee*. In *Desist*, unlike *Fuller* (*supra*), the Supreme Court held that the prospectivity of *Katz* v. *United States* (389 U.S. 347) would be measured from the date of seizure, the result which the majority reaches herein. Although there is mention of the prospectivity of *Lee*, no change was made in the specific holding of *Fuller*. Moreover, the reasoning which supported the *Desist* holding is inapposite herein. The date of seizure was selected because the exclusionary rule of *Katz* was not foreshadowed by the prior decisions, and it could not be said that the conduct was in knowing violation of constitutional requirements (*Desist* v. *United States*, *supra*, p. 254). On the contrary, the proscription of section 605 of the Federal Communications Act (47 U.S.C. § 605) against interception of telephonic communications had been the law for many years prior to the *Lee* decision. Judicial integrity, the lack of enforcement of the federal statute and the disrespect for the federal statute shown by state officials (*Lee* v. *Florida*, *supra*, p. 385-86) impelled

the decision. In view of *Mapp* v. *Ohio* (347 U.S. 643) and its progeny, this result was predictable.

The evidence in this case was not only illegally obtained, but illegally divulged by the police to the District Attorney, to the Grand Jury and to the Trial Jury. (Section 605, Federal Communications Act.) Even under the majority reasoning a crime was committed. Under our law there are penal and civil remedies against the police and district attorneys (*People* v. *Defore*, 242 N.Y. 13, 19, 24; *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 39 LW. 4821, June 21, 1971).

In *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 the Supreme Court said: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all." See *Nardone* v. *United States*, 308 U.S. 388; *Benanti* v. *United States*, 355 U.S. 96. *Lee* made it clear that a change in public policy was effected, making all the judgments of the Supreme Court of the United States binding on the states, and gave notice to all state officials and courts.

Accordingly, we believe that the judgment should be reversed.

* * * * * *

Judgement affirmed. Opinion by Jasen, J. All concur except Burke, J., who dissents and vote to reverse in an opinion in which Fuld, Ch. J., concurs.

APPENDIX B

Opinion of Appellate Division

Appeal by the People, (1) as limited by their brief, from so much of an order of the County Court, Nassau County, dated May 26, 1970, as granted the branch of a motion of defendants Iannacone and Kagan which was to suppress all evidence obtained as a result of electronic eavesdropping (wiretapping) concerning indictment No. 23,911; and (2) from a further order of the same court, dated July 31, 1970, which granted said defendants' motion to dismiss said indictment.

Order dated May 26, 1970, affirmed insofar as appealed from and order dated July 31, 1970, affirmed, both affirmances with leave to the People to resubmit the case to another grand jury, if they be so advised. No opinion.

RABIN, *P. J.*, LATHAM, CHRIST and BRENNAN, *JJ.*, concur.

BENJAMIN, *J.*, dissents and votes to reverse the order dated May 26, 1970 insofar as appealed from, to reverse the order dated July 31, 1970, and to deny appellants' motions (1) to suppress evidence as to indictment No. 23,911 and (2) to dismiss said indictment, with the following memorandum:

In November and December, 1966 a County Judge of Nassau County signed orders authorizing the police to tap two telephones. In April, 1967 respondents were indicted for arson on the basis of evidence obtained through these wiretaps. In 1966 and 1967 evidence obtained by such wiretaps was considered admissible in state criminal trials (Schwartz v. Texas, 344 U. S. 199). But in June, 1968 the United States Supreme Court overruled *Schwartz* and held

that telephone wiretap evidence was inadmissible in a state criminal trial (Lee v. Florida, 392 U. S. 378). And in October, 1968 it ruled that *Lee* was to be given prospective application (Fuller v. Alaska, 393 U. S. 80).

In 1969 respondents moved to suppress the evidence obtained through the 1966 wiretaps; and in 1970 they moved to dismiss the indictment on the ground that the other evidence was insufficient to support the charge. The motions were granted; the wiretap evidence was suppressed and the indictment was dismissed. The People have appealed.

The narrow issue on this appeal is whether the wiretap evidence is admissable since it was obtained before *Lee* (*supra*) but the trial was to be held after *Lee* was decided. In my opinion it is.

It is true that in *Fuller* (*supra*) which held that *Lee* (*supra*) was not to be applied retroactively, the Supreme Court used these words:

> "we hold that the exclusionary rule [of *Lee*] is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*" (p. 81).

But this language must be read with that used by the same court in the later cases of Kaiser v. New York (394 U. S. 280) and Desist v. United States (394 U. S. 244).*

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* *Kaiser* involved nontrespassory wiretapping and a state prosecution; *Desist* involved nontrespassory bugging and a federal prosecution; and both cases dealt with the retroactivity of the Supreme Court's recent holding in Katz v. United States (389 U. S. 347 [dec. Dec. 18, 1967]) that evidence obtained by nontrespassory eavesdropping was inadmissible, despite earlier holdings to the contrary.

In *Kaiser* the court said this (pp. 282-283):

> "Since the wiretapping in this case occurred before *Katz* was decided * * * its fruits were not inadmissible under the exclusionary rule of the Fourth and Fourteenth Amendments."

And in *Desist* the majority said the following:

> "the convictions must * * * be reversed if *Katz* is to be applied to electronic surveillance conducted before the date of that decision. We have concluded, however, that to the extent *Katz* departed from previous holdings of this Court, it should be given wholly prospective application (p. 246).
>
> * * * * *
>
> "we hold that *Katz* is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967" (p. 254).

Pointing up the rationale of its holding of nonretroactivity, the *Desist* majority noted (p. 253) that even before the decision in Mapp v. Ohio (367 U.S. 643) the state courts knew that unreasonable searches were unconstitutional, but that before *Katz* was decided nontrespassory electronic surveillance had not been considered unconstitutional. Commenting on this last point, Justice Fortas, dissenting, said (p. 274):

> "In *Kaiser* v. *New York*, the Court affirms a state conviction despite the fact that the conviction was based upon telephone conversations that the police had recorded by a wiretap * * * made pursuant to a warrant * * * on the assertion that the *Olmstead*

> doctrine [permitting such wiretaps] was fully viable at the time that the * * * telephone conversations were overheard."

Reading *Fuller* together with *Kaiser* and *Desist*, it seems plain to me that the present rule is that wiretap evidence obtained before *Lee* was decided is admissible at a state criminal trial, even if the trial was or is to be held after the *Lee* decision. That is the situation in the case at bar and it therefore was error to suppress the wiretap evidence and dismiss the indictment because of insufficiency of the remaining evidence. Hence, the order suppressing evidence should be reversed insofar as appealed from and the order dismissing the indictment in question should be reversed and the motions for that relief denied.

APPENDIX C

Remittitur

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and seventy-one, before the Judges of said Court.

Witness,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur July 7, 1971.

THE PEOPLE &c.,

Appellant,

vs.

ERASMUS IANNACCONE and FREDERICK KAGAN,

Respondents.

BE IT REMBERED, That on the 13th day of May in the year of our Lord one thousand nine hundred and seventy-one, The People &c., the appellant—in this cause, came here unto

the Court of Appeals, by William, Cahn, District Attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Erasmus Iannaccone and Frederick Kagan, the respondents in said cause, afterwards appeared in said Court of Appeals by Evseroff, Newman & Sonenshine, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Henry P. DeVine, of counsel for the appellant, and by Mr. Gustave H. Newman, of counsel for the respondent(s), and by Mr. Lewis R. Friedman, of counsel for the amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, the indictment reinstated and the case remitted to Nassau County Court for trial (See *People* v. *Feinlowitz*, decided herewith).

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Nassau County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court

of Appeals remitted into the County Court, Nassau County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

GEARON KIMBALL
Deputy Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,

Albany, July 7, 1971.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

GEARON KIMBALL

Deputy Clerk.

[SEAL]

APPENDIX D

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Supreme Court, U.S.
FILED
SEP 13 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-223

ERASMUS IANNACCONE and FREDERICK KAGAN,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

WILLIAM CAHN
District Attorney, Nassau County
Attorney for Respondent
County Court House
Mineola, N. Y.

HENRY P. DEVINE
Assistant District Attorney
of Counsel

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IN THE

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—o—

ERASMUS IANNACCONE and FREDERICK KAGAN,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

—o—

BRIEF IN OPPOSITION TO A PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Erasmus Iannaccone and Frederick Kagan, pray that a writ of certiorari shall issue to review a judgment of the New York State Court of Appeals entered in the above entitled case on July 7, 1971.

Opinions Below

An opinion was rendered by the New York State Court of Appeals, a copy of which is annexed to the brief as Appendix A.

On appeal from the original order of the Nassau County Court dismissing the indictment, the Appellate Division of the Supreme Court, Second Department, affirmed on February 8, 1971, without opinion. A dissenting opinion was written by Mr. Justice Benjamin, a copy of which is annexed to the brief as Appendix B.

Jurisdiction

The jurisdiction of this Court is sought pursuant to 28 U.S.C. § 1257, subd. 3, and Rule 19, subd. 1 of the Rules of this Court. The judgment sought to be reviewed is that of the New York State Court of Appeals made on July 7, 1971.

Question Presented

On April 27, 1967, both petitioners were indicted by a Nassau County Grand Jury for Arson Third Degree, the indictment alleging that the defendants "wilfully burned and set on fire an unoccupied dwelling owned by Edward Brody located at 15 Mayflower Place, Floral Park, County of Nassau, State of New York, on or about the 16th day of December, 1966."

In 1934, Congress enacted § 605 of the Federal Communications Act making it a crime to tap and divulge a telephone conversation without the consent of the sender. This Court in December of 1952 decided wiretap evidence was admissible in a state court criminal prosecution, 605 notwithstanding (*Schwartz* v. *Texas*, 344 U.S. 119). Sixteen years later, on June 7, 1968, this Court reversed itself concluding 605 did, indeed, outlaw wiretap evidence in a state court criminal trial (*Lee* v. *Florida*, 392 U.S. 378).

Four months later on October 28, 1968, this Court held the *Lee* doctrine would be applicable to *trials* commenced after June 17, 1968, the birth date of *Lee* v. *Florida*, *supra* (*Fuller* v. *Alaska*, 393 U.S. 80).

Accordingly, both petitioners motioned the Nassau County Court contending their indictment was predicated on wiretap evidence alone, which it was, that the wiretap evidence must be suppressed and the indictment dismissed as required by *Lee* v. *Florida*, *supra*, *and Fuller* v. *Alaska*, *supra*. The County Court Judge agreed, suppressing the

evidence by order dated May 26, 1970, and dismissed the indictment by order dated July 31, 1970. The New York State Court of Appeals held the doctrine of *Fuller* v. *Alaska, supra,* did not survive *Desist* v. *United States* (394 U.S. 244) and *Kaiser* v. *New York* (394 U.S. 280) concluding that wiretap evidence in cases not yet tried was competent.

Petitioners contend the decision of the Court ran afoul of the Fourth Amendment, § 605 of the Federal Communications Act as construed by this Court in *Fuller* v. *Alaska, supra,* which is controlling, *Desist* v. *Kaiser* notwithstanding.

Constitutional Provision Involved
Amendment Fourteen

The specific constitutional provision involved is that portion of the Fourth Amendment to the United States Constitution having to do with unreasonable searches and seizures.

The Writ Should Be Disallowed

There are no compelling reasons for granting the writ because the New York State Court of Appeals did not decide a federal constitutional question heretofore undetermined by this Court. Moreover, the Court of Appeals has not decided this case in a way probably not in accordance with any prior controlling decision of this Court.

Unquestionably this Court has a long and proud tradition of giving effect to the law as it existed at the time of its decision (*Hamm* v. *Rockhill,* [1964] 379 U. S. 306; *Bell* v. *Maryland,* [1964] 378 U.S. 226; *United States* v. *Chambers,* [1934] 291 U.S. 217, pp. 222-223; *Massey* v. *United States,* [1934] 291 U.S. 608; *United States* v. *Schooner Peggy,* [1801] 1 Cranch 103, p. 110).